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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-461

SOPHIE M. GRABOWSKI, individually, as personal representative of the deceased, EDWIN T. GRABOWSKI, and as guardian of the estate of the minor children of EDWIN T. GRABOWSKI,
Petitioner,

v.

NORTHERN FISHING & TRADING COMPANY, INC., a corporation, owners of the fishing vessel NORTH SEA, and ALEUTIAN KING CRAB, INC., a corporation, charterer of the fishing vessel NORTH SEA, who herein petitions for exoneration from or limitation of liability,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

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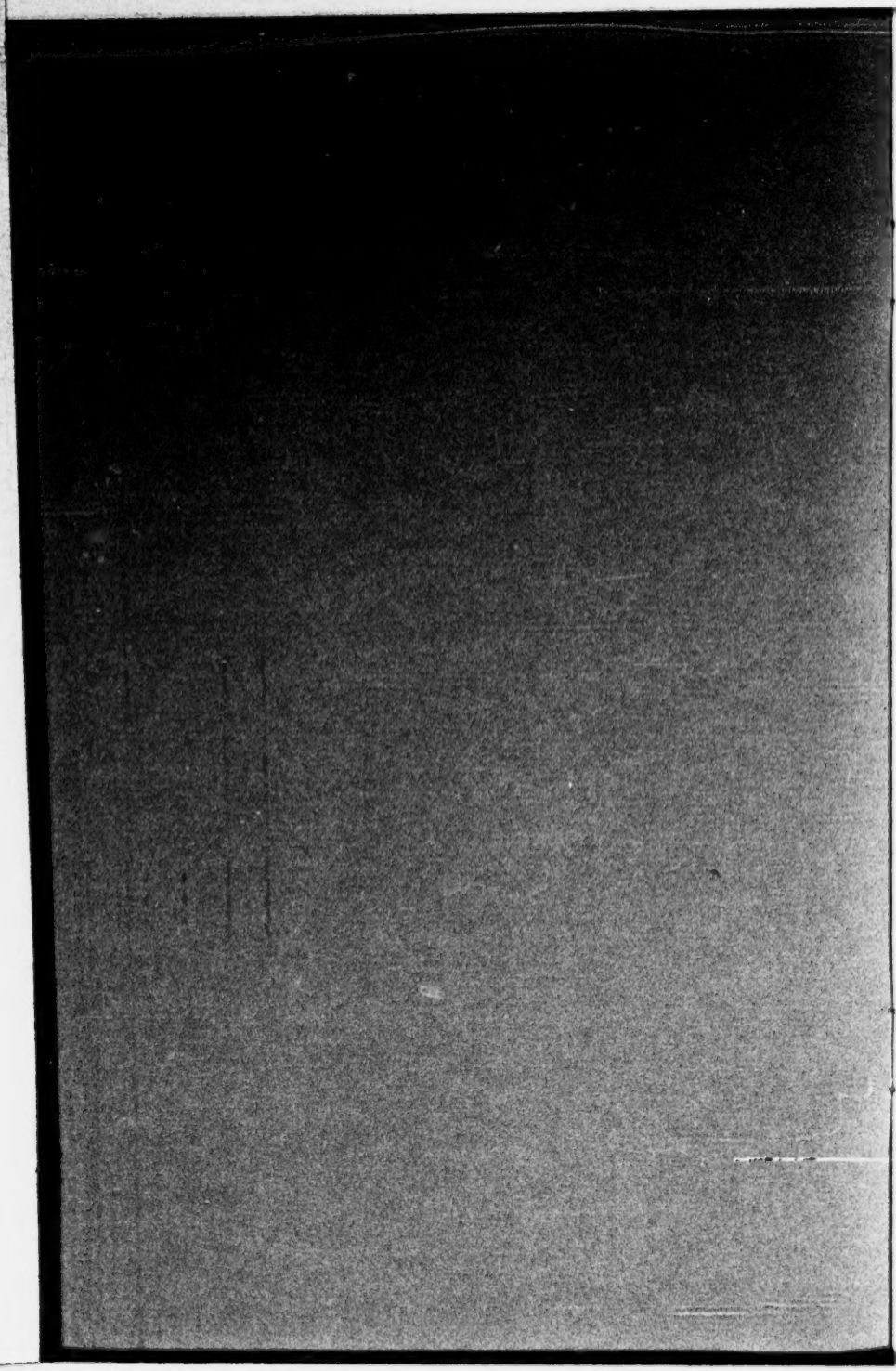

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ARGUMENT

A. The Claimed Conflict Between Circuits Has Heretofore Been Considered by This Court—and Rejected

The Petitioner summarizes the alleged conflicts between circuits as follows (Petitioner's Brief page 11 and page 13):

> "A. The Rule in the 3d and 5th Circuits is that if the Weather Could Reasonably Have Been Anticipated the Vessel Must be Strong and Staunch Enough to Weather the Storm, or it Is Presumed Unseaworthy as a Matter of Law."
>
> • • •
>
> "B. The Rule in the 9th Circuit Unlike the 3d and 5th

> Circuits Is That Affirmative Evidence of Unseaworthiness Must First Be Established and Then the Claimant May Benefit From the Inference to Establish Causation."

In discussing the rule in the 5th Circuit, the petitioner relies upon *Walker v. Harris*, 335 F.2d 185 (5th Cir. 1964) cert. den. 379 U.S. 930, 85 S. Ct. 326, 13 L. Ed. 2d 342. In discussing the rule in the 9th Circuit, the petitioner relies upon *Walston v. Lambertsen*, 349 F.2d 660 (9th Cir. 1965) cert. denied 382 U.S. 980, 86 S. Ct. 553, 15 L. Ed. 2d 470 (1966).

It is to be noted particularly that certiorari was denied in the *Walston* case. The issue presented to this Court in that case eight years ago was whether there was a conflict between *Walston v. Lambertsen, supra,* and *Walker v. Harris, supra,* with respect to the treatment by the respective circuits of the rule of presumption of unseaworthiness. THIS IS THE IDENTICAL ISSUE PRESENTED TO THIS COURT IN THE CASE AT BAR.

In formulating the issue to be presented to this Court in 1965, the petitioner in *Walston* stated in her petition for certiorari (page 6):

> "REASONS FOR GRANTING THE WRIT
>
> "1. The decisions of the Court below in the instant case are directly in conflict with the decision of the United States Court of Appeals for the Fifth Circuit in *Walker v. Harris*, 335 F.2d 185 (1964); cert. den. 379 U.S. 930, 85 S. Ct. 326, 13 L. Ed. 2d 342."

The above quotation is taken from the "Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit" on file in this court being Docket No. 717.

The *Walston* petition was denied by this court on January 17, 1966.

B. There Is Still No Conflict in Circuits

In claiming a conflict exists between the 3rd and 5th Circuits on the one hand and the 9th Circuit on the other, the petitioner relies on only three leading cases. The following critical analysis of each will show that they are in accord with this Court's acknowledgment that the mere fact of loss of a vessel is not ipso facto proof of unseaworthiness.

In *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 4 L. Ed. 2d 941, 80 S. Ct. 926, 1960 A.M.C. 1503 (1960), is found the following:

> ". . . The standard is not perfection, but reasonable fitness; not a ship that will weather *every conceivable storm* or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service. *Boudoin v. Lykes Bros. S.S. Co.*, 348 U.S. 336, 99 L. Ed. 354, 75 S. Ct. 382." 362 U.S. at 550 (emphasis ours).

THIRD CIRCUIT

In the Third Circuit petitioner cites only the case of *Eastern Gas & Fuel Associates v. Martin Marine Transit Company*, 190 F.2d 394 (3d Cir. 1951). This case dealt with a suit by the cargo owner against the carrier under a charter party. The claim developed out of the turning over of a barge under conditions which were described as a moderate gale. The witnesses testified, however, that the weather was not unusual and it was of the type which one could expect to encounter at that time of year. The court therefore concluded that the lower court's finding of the capsizing having been because of a storm constituting a

peril of the sea was erroneous. In applying the presumption of unseaworthiness, the court stated:

> "But the logical inference of unseaworthiness which follows from the unexplained sinking of a vessel in *weather she should be able to withstand* suffices to discharge that burden unless and until the carrier shall affirmatively show exculpatory circumstances." (Emphasis ours)

Again, in concluding the court stated:

> "It is sufficient that libelant was entitled to prevail on the basis of the inference of unseaworthiness which should have been drawn from the unexplained sinking in weather *the vessel should have been able to withstand.*" (Emphasis ours).

Turning to the case at bar, while some witnesses may have said that extremely strong winds and/or storms were to be anticipated in the Bering Sea area at that time of year, no one testified nor could the court have properly concluded that a fishing vessel would have to be constructed to withstand hurricane forces which, from the weather reports emanating at the time of the casualty, were expected up to gusts of 180 miles per hours. In short, that portion of the presumption based on a "calm sea" or even a sea which the vessel should "be able to withstand" simply does not here exist.

FIFTH CIRCUIT

The leading case in the Fifth Circuit is *Walker v. Harris*, 335 F.2d 185 (5th Cir. 1964), cert. den. 379 U.S. 930, 85 S. Ct. 326, 13 L. Ed. 2d 342. The sinking of the tug "*Ralph E. Havens*" was found by the trial court to have been the result of a severe and unexpected storm and the petition for exoneration was therefore granted, the court stating

that exoneration from liability is allowed when the loss is not caused by unseaworthiness or negligence.

After receiving the available weather reports, the captain, who had prior experience in these waters, exercised his judgment and proceeded on course along the Florida Coast. The weather worsened rapidly and as a result the vessel took on large amounts of water and eventually sank. The court stated that when a storm is relied upon to explain the sinking of the vessel, it must be shown to have been of "'extraordinary intensity," which term however is concededly a relative matter. The court concluded that for a vessel of the size in question, the waves encountered from 12 to 13 feet constituted such a storm. The court was not convinced of the claimed inadequacy of various equipment aboard the vessel nor the master's negligence in navigation. Accordingly, the petition for exoneration was granted.

The Fifth Circuit, in reversing the trial court, commenced by claiming it would do so without rejecting as clearly erroneous the trial court's findings of fact. The court then reviewed in some detail the graphic facts of the incident, concluding that wind forces of 33 to 36 miles an hour and seas from 5 to 12 feet in height demonstrated only relative low velocity of wind and limited height of sea. The trial court's holding is paraphrased as stating that a vessel incapable of withstanding winds of this relatively low velocity in seas of limited height is nevertheless seaworthy. The appellate court said that this result can be justified on only one of two grounds, namely (1) that the natural forces were so severe and unpredictable for the time and place that the prudent shipowner had no reason

to anticipate their occurrence, or (2) assuming a duty to anticipate this weather, some new and wholly predictable act intervened which made it reasonably impossible for the crew to extricate themselves. The court found that neither of these two conditions was established by the record.

The court concluded that the real question in the case is that of whether or not the seas of the kind actually encountered were reasonably to be anticipated. Relied upon was the testimony of the shipowner's witness who, with experience in the area, stated that there was nothing unusual about a 35 miles an hour wind in connection with northwesters, that northwesters at this time of year in that area were not uncommon, and that any vessel operating in the area should be reasonably fit to overcome such a northwester, or in other words, if she could not do so she would be unseaworthy. The court then referred to *R. T. Jones Lumber v. Roen Steamship Co.*, 270 F.2d 456 (2 Cir. 1959), 1960 A.M.C. 46, where the storm was not an unusual event but which could reasonably be anticipated and provided against; the *Petition of Moore McCormack Lines, Inc.*, 164 F. Supp. 198 (S.D.N.Y., 1958), 1958 A.M.C. 1497, where the weather encountered was to be expected on the voyage; and *Eastern Gas and Fuel Associates v. Martin Marine Transit Company*, 190 F.2d 394 (3d Cir. 1951), 1951 A.M.C. 1518, that the weather must be irresistible, overwhelming, and extraordinary to be a good exception.

Referring to the cases relied upon by the trial judge, the court noted the inadvisability of referring to insurance cases for guidance. The court stated:

> "More important, insurance cases which turn on the law's quest for the contractors' intention are poor analogies in assaying the 'public' duties imposed by

> law on ships and shipowners for the protection of people and property."

The court then referred to the application of the "familiar doctrine so often invoked" where vessels sink in calm waters, that the sinking under circumstances which the vessel must reasonably anticipate and overcome is the best proof of, and makes out the classic case of, unseaworthiness. As support for this "familiar doctrine" the court referred to the collected cases to be found in *Tropical Marine Products v. Birmingham Fire Insurance Co.*, (5 Cir. 1957), 1957 A.M.C. 1946, 1948, 1949, 247 F.2d 116, 118. The six cases collected there, however, are, without exception, those dealing with rights under an insurance policy or under a cargo bill of lading (a contract). Generally, it shows that the carrier, libelant, or claimant, is required to establish that the cause of the loss was due to peril insured against.

The court then turned to the items of alleged *specific* unseaworthiness of the *Ralph E. Havens, i.e.*, the single strength glass pilot house panes and the various pumps aboard. It found the trial court in error for concluding that the pumps and window panes were adequate. On these points the court stated (p. 193):

> "But none of these things or conditions was unknown, unexpected, or unpredictable. Indeed, it was just such things which made the Tug *reasonably unfit* for these waters in this season. Forces and conditions which she had the duty of anticipating cannot amount to an intervening and new cause to excuse the disastrous result." (Emphasis ours)

In addition to the above findings of unseaworthiness, the court went into great detail on the condition of the lifeboat

and concluded that it, too, and therefore the Tug, was unseaworthy.

From the foregoing it is clear that the court did not find liability based on a *presumption* of unseaworthiness but rather on specific findings of unseaworthiness. This is exactly what the Ninth Circuit in *Walston, supra,* found to be a necessary element before the presumption could be applied to an otherwise unexplained disappearance.

It is one thing to say that a vessel must be prepared for and overcome weather conditions which can be anticipated in a given area when vessels generally of that size routinely transit the area. It is another thing for the *"North Sea,"* a small fishing vessel, to be caught on the open sea with predicted winds of from 40 to 60 knots with wind gusts in certain places to be triple this amount (or up to 180 knots). It can be stated without fear of contradiction that no fishing vessel of the stated size was ever constructed to withstand such catastrophic forces.

The area of our casualty, the Bering Sea, is known as the "birthplace of all storms." More than one of the fishermen witnesses testified about their prior experiences with winds in this area in the vicinity of 100 miles per hour. In all such instances, however, the prudent course was followed of seeking shelter which the deceased here originally sought to do.

In summary on the *Harris* case, it appears that the Fifth Circuit found:

(1) The weather was "moderate" for a vessel of this size,

(2) The weather was reasonably to be anticipated,

(3) The vessel was unseaworthy not by presumption but because of:

A. Inadequate pump,

B. The window panes were ordinary (and weak),

C. The lifeboat was unseaworthy.

This can hardly be the case supporting the claimed presumption of unseaworthiness when a vessel disappears without explanation in calm waters. As such, the opinion cannot be said to be in conflict with the holdings of the Ninth Circuits in *Walston, supra.*

NINTH CIRCUIT

In the *Walston* case, *supra*, the Ninth Circuit court found that the actual cause of the sinking of the vessel could not be proved. The vessel disappeared on a day when the breeze was light, the seas were calm, the weather was clear and the visibility was six miles. The court stated in part (p. 662):

> "The appellant contends that the district court erroneously failed to apply the doctrine of *res ipsa loquitur* to her advantage. Our court has held that if a claimant establishes that a vessel is unseaworthy, the trial court may presume that the unseaworthiness was the proximate cause of the sinking, otherwise unexplained, of a vessel in calm seas."

The court then referred to decisions in the Fifth, Sixth, Seventh and Ninth Circuits and then stated (p. 662):

> "A review of the opinions in these cases and all others which might seem somewhat analogous to the case at bar makes it clear that the presumption which appellant would apply has been indulged only when the claimant has been able to establish to the satisfaction of the trial court that the vessel was unseaworthy at the time it departed on its last voyage. The sea itself

contains many hazards, and an inference of liability of the shipowner for the mysterious loss of his vessel should not be lightly drawn. The court below obviously and properly believed that there could be no foundation for the inference absent satisfactory proof of an unseaworthy condition which might reasonably be expected to relate directly to the sinking of the vessel."

Another Circuit Court with extensive admiralty experience also had occasion to consider this same rule of presumption of unseaworthiness and in so doing indicated its belief that the Fifth and Ninth Circuits both follow the same rule. *In re Marine Sulphur Queen*, 460 F.2d 89, 99, 1972 A.M.C. 1122, 1133 (2 Cir. 1972), Judge Anderson stated:

> "It is settled that when a vessel disappears in expectable weather under otherwise unknown circumstances, proof by the plaintiffs of some element of unseaworthiness will permit the trier of fact to infer that the unseaworthiness was the proximate cause of the loss. *Walston v. Lambertsen*, 349 F.(2d) 660, 662 (9 Cir. 1965), cert. denied, 382 U.S. 980, 86 S. Ct. 553, 15 L. Ed. 2d 470 (1966) (dicta); *Admiral Towing Co. v. Woolen*, 290 F.(2d) 641, 649-651 (9 Cir. 1961); *Roth v. Bird*, 239 F.(2d) 257, 262 (5 Cir. 1956); *The Cleveco*, 154 F.(2d) 605, 615 (2 Cir. 1946). Although the lower court did not clearly state that it drew this inference of causation, we hold that its resolution of the liability of the owners to the Death Claimants subsumes such an inference. While the lower court may, to some extent, have relied on inappropriate authority for such an inference, we see nothing in the lower court's opinion inconsistent with the conclusion that it drew the inference that the several aspects of unseaworthiness were, in their totality, the proximate cause of the Queen's disappearance, cf. *Leather's Best, Inc. v. SS Mormaclynx*, 451 F.(2d) 800, 813 (2 Cir. 1971)."

At least one District Court in the Fifth Circuit has also expressed its belief that the Fifth Circuit and Ninth Cir-

cuit rules are not in conflict. In *Travelers Indemnity Co. v. Gulf Weighing Corp.*, 352 F. Supp. 335, (E.D. La. 1972), the court followed the rule of the Fifth Circuit and, in addition, cited with approval the *Walston* case, *supra.*

CONCLUSION

We believe that the key to the petitioner's sincere but incorrect belief that there is a conflict between the Circuits on the "presumption of unseaworthiness rule" is her failure to observe the use by the various courts of the single word "operating."

A distinct line of delineation must be drawn between the following two evidentiary propositions:

1. Evidence that the storm was unusually severe, the turbulence of which had not been experienced during that particular season and for several years prior thereto and that said storm, which could reasonably have been anticipated at that time of year, was a full gale with mountainous seas and winds gusting to hurricane force. (See Finding of Fact No. 12).

2. Evidence that it is intended to operate a *particular* vessel in an area and at a time when it is reasonable to anticipate that the vessel and/or its condition is inadequate to withstand the weather which is to be anticipated.

Neither the Fifth nor Ninth Circuits would require a shipowner to provide a vessel capable of withstanding storms of any conceivable size and strength. What is essential however, is that the vessel be able to withstand normal *operating* conditions.

It is respectfully submitted therefore that there does not exist a conflict between Circuits, that this particular area of maritime law is clear and well-defined throughout the land and that a review by this honorable Court is unnecessary at the present time.

Respectfully submitted,

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